

14 August 1974

MEMORANDUM FOR THE RECORD

SUBJECT : U.S. v IBM

REFERENCE: MFR, para 5, dtd 12 Aug 74

1. Today Mr. Edward Weintraub, Department of Commerce, OGC, called in response to the questions I had put to General Counsel Bakke on 12 August.

2. According to Weintraub:

(a) Both Messrs. Katz and Esherick knew that the National Bureau of Standards (NBS) intended to release the four Agency classified documents to IBM. He quotes Esherick as saying, "That will be fine," or words to that effect.

(b) He does not know who in IBM has present custody of the documents, only that they were given to Messrs. Strickland and Riek.

3. I repeated my previously expressed concern that our documents should have been handled in that manner. When Weintraub attempted to argue that the Agency had had prior notice, I quoted the Third Agency Rule as set out in 3A CFR, 1972 Comp., at page 237.

4. Weintraub also said that on Friday, 16 August, IBM is to inspect the files of Commerce's Office of Export Administration, which also contain Agency documents (See Tab B of referent). Inspection is to be limited to IBM identifying those materials desired, copies of which are to be supplied at a later date. Carl Seasword, Program Officer, Commerce, is to supervise the exercise. Weintraub has no information on the identities of the IBM "inspectors."

5. I have passed on to [redacted] (OS/PSD) and [redacted] (DDI/OER) the information I have received on the 16 August inspection. I also suggested they might wish to have a representative in attendance so we might learn directly which of the Agency documents, if any, IBM wanted copied.

[redacted]
Associate General Counsel

cc: OGC
[redacted]

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REFERENCE: MFR dtd 12 Aug 74, same subject

1. During the past week, I have had several telephone conversations with attorneys Esherick and Katz of the Anti-Trust Division, Justice, regarding the matter of the National Bureau of Standards having released certain Agency classified documents directly to IBM. My purpose was to learn who had been responsible for this failure to adhere to the inspection procedures we had previously agreed upon. My efforts have not been entirely successful in that the culprit still remains unidentified. However, I believe it is fair to conclude that since Justice was fully aware of the inspection procedures, it must bear the ultimate responsibility. Katz has intimated as much. Esherick would maintain that the fault lies with the Department of Commerce.

2. According to Esherick, Commerce has been "dragging its feet in general," and with respect to the production of certain materials, it has sought to avoid complying with Judge Edelstein's orders by arguing statutory confidentiality or security classification. These tactics have generated Edelstein's ire. At a recent pretrial hearing, he directed some scathing remarks at the Government and threatened the Secretary of Commerce and his General Counsel with a citation for contempt. He has ordered Commerce to produce forthwith all relevant documents contained in its files, or else. As a consequence of this threat, Esherick intimates that Commerce panicked. However, it is entirely possible that Justice may also have had a seizure. In this connection, Allen Farrar (Legal Adviser, NBS) had previously told me that Justice has been exerting a great deal of pressure on Commerce so as to avoid giving Edelstein grounds for granting IBM's STATOTHR motion to dismiss the Government's complaint.

[Redacted Signature]

Associate General Counsel

cc: OGC